Supreme Court, U.S.
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No. 95-1104

In The

Supreme Court of the United States

October Term, 1995

KENNETH J. OWEN, *Petitioner,*

vs.

THE STATE BAR OF CALIFORNIA, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

DIANE C. YU, S.B. #78676
RICHARD J. ZANASSI, S.B. #105044
COLIN P. WONG, S.B. #130033*
555 Franklin Street
San Francisco, California 94102
Telephone: (415) 561-8200

Attorneys for Respondent

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the State Bar of California's procedure for reviewing unsuccessful applicants taking the First Year Law Students Examination denies petitioner Due Process?

2. Whether the allegations of fraud by Petitioner in the administration of the First Year Law Students Examination by the Committee of Bar Examiners of the State Bar of California violates the Equal Protection Clause raising an important federal question which should be decided by this Court?

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STATEMENT OF THE CASE

Petitioner, Kenneth J. Owen, an unsuccessful applicant in the June 1994 and October 1994 First Year Law Students Exam ("FYLSX"), is seeking review by this Court due to his failure to pass the FYLSX as administered by the Committee of Bar Examiners (hereinafter, "the Committee") of the State Bar of California (hereinafter, "State Bar"). Passage of the examination would have entitled Petitioner to receive credit for his first year law study at Oakland Law School, an unaccredited law school in Oakland, California.

The State Bar of California and its Committee of Bar Examiners (hereinafter referred to collectively as "Respondent"), respectfully submits that for the reasons set forth herein, the petition should be denied.

In January 1995, Petitioner wrote to Assembly member Michael Sweeney for the Eighteenth Assembly District, seeking reconsideration by the Committee of Bar Examiners of his grade on the June 1994 FYLSX. (Petition,

p. 3.) On January 23, 1995, Adam S. Ferber, Director for Examinations for the Committee of Bar Examiners responded to Petitioner's request by letter explaining the Committee's reasons for denying his request.

Petitioner then formally petitioned the full Committee of Bar Examiners for reconsideration of the results of his June 1994 FYLSX. The Committee responded by letter dated March 28, 1995, denying his request for reconsideration. (Petition, p. 3.) On April 9, 1995, Petitioner wrote to Adam S. Ferber requesting information regarding scaling formulas applied to the June 1986 through October 1994 FYLSX, to support his petition to the California Supreme Court. Mr. Ferber responded on behalf of the Committee by letter dated April 12, 1995, denying Petitioner's request.

On or about May 10, 1995, Petitioner filed a petition with the California Supreme Court. On October 4, 1995, the Court denied the petition. Petitioner then filed the instant petition for Writ of Certiorari on January 2,

1996. In his petition, Petitioner questions the procedure adopted by the Committee in arriving at the scaled scores that comprise his final grade on the FYLSX. Petitioner claims that the procedure used by the Committee is fraudulent, unlawfully and arbitrarily fabricated and results in the discriminatory treatment of students attending unaccredited law schools, in violation of the Due Process and Equal Protection Clauses of the United States Constitution. Petitioner's final scaled grade on the June 1994 FYLSX was 537.4300. The minimum passing scaled grade for this examination was 560. Petitioner's final scaled grade on the October 1994 FYLSX was 537.5000. The minimum passing scaled grade for this examination was 560.

Respondent submits that the Committee reviewed both Petitioner's request for reconsideration and petition for certification in accordance with established Committee policies and procedures adopted pursuant to the Rules Regulating Admission to Practice Law in California; that

the Committee responded to Petitioner's requests for information to the extent allowed under its disclosure policy; that Petitioner's contentions regarding the scaling formulas applied to the FYLSX are without merit; and that Petitioner's examination was graded in accordance with established grading and scaling procedures.

Petitioner's contentions are: (1) that the Committee has acted fraudulently in scaling the FYLSX grades, (2) that application of the scaling formula to the FYLSX results in discrimination against law students taking the FYLSX, (3) that the scaling formula is unlawful and erroneous, and (4) that the Committee's actions with regard to his petition for certification contravene the Due Process and Equal Protection clauses of the Fourteenth Amendment of the United States Constitution. Respondent submits that it at all times acted properly and within its authority in conducting the FYLSX and in reviewing Petitioner's petition.

REASONS FOR DENYING THE WRIT

1. Petitioners' Failure To Pass The First Year Law Students Examination Did Not Deprive Him Of His Due Process Rights

A. The Committee's Interpretation And Enforcement Of The State Bar Act Is Entitled To Great Weight.

In California, admission to the practice of law is an exercise of one of the inherent powers of the California Supreme Court. (Merco Construction Engineers, Inc. v. Municipal Court (1978) 21 Cal. 3d 724, 727-729; Stratmore v. State Bar (1975) 14 Cal. 3d 887, 889; Brydonjack v. State Bar (1929) 208 Cal. 439; People v. Turner (1850) 1 Cal. 143, 150; see Cal. Const., art. VI, § 1.) To assist the Supreme Court in the administration of the admission process, the Board of Governors of the State Bar, pursuant to sections 6046 and 6046.5 of the Business and Professions Code, has appointed the Committee of Bar Examiners to have primary responsibility for the Bar Examination process and to act as the administrative arm of the California Supreme Court in admission matters. (In re Investigation

of Conduct of Examination for Admission to Practice Law (1934) 1 Cal. 2d 61, 67; Chaney v. State Bar of California (9th Cir. 1967) 386 F.2d 962, 966.)

In that regard, the Committee has the power to: (a) examine all applicants for admission; (b) administer the requirements for admission to practice; and (c) certify to the California Supreme Court for admission those applicants who fulfill the requirements. (Bus. & Prof. Code, §§ 6046, 6060 and 6064; Cal. Rules of Court, rule 952(d); Rules Regulating Admission to Practice Law, rule I, § 2 West Supp. 1994).) Moreover the Committee has the power to adopt such reasonable rules and regulations as may be necessary or advisable for the purpose of making effective the requirements for admission. (Bus. & Prof. Code, § 6047.)

The Committee is the only agency charged with the administration of the Bar Examination. As such, its interpretation of and consequent actions in carrying out its duties are entitled to great weight unless clearly erroneous.

(In re Kelly (1983) 33 Cal. 3d 267, 277; Rivera v. City of Fresno (1971) 6 Cal. 3d 132, 140.) Petitioner has failed to demonstrate that the Committee's actions were erroneous. Moreover, it has been held that the inability of one applicant to pass examinations that are successfully passed by other applicants will not be inquired into by the Court. (In re Investigation of Conduct of Examination for Admission to Practice Law, supra, 1 Cal. 2d at 64; see also Johnson v. State Bar (1968) 268 Cal.App. 2d 437, 444.) Clearly, some applicants passed both the June and October 1994 FYLSX. Therefore, this Court should deny Petitioner's request to inquire further into Petitioner's inability to pass the Examination.

B. Petitioner's Right to Due Process Was Not Violated

Petitioner contends that his due process rights were violated because he was not provided with a hearing in this matter. (Petition, p. 4) By statute, an unsuccessful applicant can inspect his examination (Bus. & Prof. Code

§6065). Further, applicants who are refused certification to the Supreme Court for admission to practice can petition the Supreme Court, as Petitioner has, for further review. (See, Bus. & Prof. Code §6066.) Moreover, Petitioner's unqualified right to retake the examination further satisfies due process. (Tyler v. Vickery (5th Cir. 1975) 517 F.2d 1089, 1103, cert. den. 426 U.S. 940 (1976).) Therefore, there is no viable due process claim advanced by Petitioner.

2. The First Year Law Students Exam Has Been Upheld As Constitutional By The California Supreme Court And Is Not In Contravention of The Equal Protection Clause

The requirements for admission are delineated in Business and Professions Code, section 6060. Not only do those rules require that an applicant be of age and have good moral character, but also that he or she meet the educational requirements and procedural safeguards implemented especially for non-accredited law schools and correspondence schools. (Bus. & Prof. Code, § 6060(e).) In its rules, the Committee also specifically sets forth

certain educational requirements. (Rule VII, §§ 5, 6 and 8 (West Supp. 1994).)

Included in both the Business and Professions Code and the Committee's rules is the requirement that first year students at non-accredited law schools take and pass the FYLSX. (Bus. & Prof. Code, § 6060(g); Rules Regulating Admission to Practice Law, Rule VI (West Supp. 1994).)

In approving and upholding the constitutionality of the FYLSX, the California Supreme Court has enunciated the strong public policy justifying this requirement. (Bib'le v. Committee of Bar Examiners (1980) 26 Cal. 3d 548, 554, cert. denied, 559 U.S. 860 (1980).) Indeed, one of the primary purposes of the FYLSX is to give applicants some indication of the quality of their education, so they can measure their likelihood of success on the general bar exam. (Bib'le, 26 Cal.3d at 554.) "Such policy will surely be frustrated if the committee can be estopped from requiring an applicant to take and pass the FYLSX when that applicant is not exempt therefrom." (Id.)

The present case is substantially similar to the situation in Lupert v. California State Bar (9th Cir. 1985) 761 F.2d 1325, cert. denied, 474 U.S. 916 (1985). In Lupert, the plaintiff challenged the constitutionality of Business & Professions Code, section 6060(g) alleging that the statute discriminated based on the "status" of law students. In rejecting plaintiff's claim and upholding the constitutionality of the FYLSX the Lupert court relied on the reasoning set forth by the California Supreme Court in Bib'le, holding that the strong public policy underlying the FYLSX exam:

> both protects persons from continuing to pursue a profession for which they are not qualified, and aids qualified persons in judging the quality of the training and education they are receiving in preparation for the bar examination. Not only are these legitimate state interests but there is a rational basis for the different treatment of students receiving instruction at accredited and unaccredited schools because the committee, by setting standards for accreditation, can impose minimum standards on the quality of education at accredited schools.

(Id. at 555.)

Petitioner's contentions that Respondent has "deprived [him] of obtaining a legal education at Oakland College of Law" are without merit. As a non-accredited law school student, Petitioner is not exempt from the requirement of taking the FYLSX. In order to receive credit for his first year of study, or any subsequent work, he must take and pass the FYLSX. By requiring Petitioner to take and pass the FYLSX, Respondent is in no way discriminating against him or preventing him from obtaining a legal education. Petitioner may still continue to pursue his studies and complete the Juris Doctor program at Oakland College of Law, only his earned units will not at this time be credited toward acceptance to practice law in California.

3. The Committee Complied With Established First Year Law Student's Examination Grading And Scaling Procedures

In 1986, the State Bar Act was amended to specifically permit scaling to be used on both the General Bar Examination and the First Year Law Students

Examination, for the purpose of maintaining an examination of uniform difficulty from year to year. (Bus. & Prof. Code, § 6046.6.) Since the multiple-choice portions of both the GBE and the FYLSX are "equated" exams (the scores of which are adjusted to control exam-to-exam variations in test difficulty), converting the written section scores to the multiple-choice scale results in an overall exam that remains at a constant level of difficulty, regardless of differences in the degree of difficulty of the questions from exam to exam and differences in the leniency of the grading from one exam to the next. (See Declaration of Stephen P. Klein pp. 4-5, hereafter "Klein Declaration" attached as "Appendix A" hereto.)[1]

Following the amendment to the State Bar Act, the State Bar's Committee of Bar Examiners, with guidance from an expert in the field, in February 1987 instituted a grading procedure for the General Bar Exam (GBE) that

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[1] The declaration was contained in the record before the lifornia Supreme Court.

included the scaling of the scores on the multiple choice, or multi-state bar exam (MBE) portion of the exam. The scaling of scores necessarily involves the multiplication of, as well as subtraction from, and/or addition to, the raw scores obtained on the MBE sections of the exam. Such manipulation of the raw scores is inherent in the very definition of equating exam scores. The multiple choice portion of the FYLSX is scaled in accordance with the same scaling procedures used on the MBE portion of the GBE, except that MBE raw score are converted to a 2,000 point scale whereas FYLSX multiple choice scores are converted to a 400 point scale. (Klein Declaration, pp. 7-8.)

The First Year Law Students Exam is given in June and October of each year. An applicant may sit for the examination as many times as desired until it is passed. Petitioner took and failed to pass the FYLSX in both June of 1994 and October of 1994.

The examinations which Petitioner took consisted of four essay and one hundred multiple-choice questions on contracts, torts and criminal law. The maximum score possible on each portion of the examinations was 400 points, with a total possible score of 800 points. In order to pass either the June 1994 FYLSX or the October 1994 FYLSX, it was necessary to receive a total scaled score of 560 points or 70% of 800. Petitioner received a failing total scaled score of 537.4300 on the June 1994 FYLSX and a failing total scaled score of 537.5000 on the October 1994 FYLSX.

If an applicant does not pass the FYLSX but receives a total scaled score of 540 points or more, the applicant's essay answers are automatically reappraised by an independent reappraiser as a routine part of the grading process. Petitioner did not receive a high enough score on either the June 1994 FYLSX or the October 1994 FYLSX to be eligible for a reappraisal of his essay answers.

Petitioner contends that the scaling formula used on the FYLSX is unfair as compared to the scaling formula used on the GBE, and that if the GBE scaling formula was applied to his FYLSX raw score, he would have passed the exam. As pointed out in the Declaration of Stephen P. Klein ("Appendix A"), this contention is erroneous and reveals a fundamental misunderstanding of the function of scaling and equating of examination scores. (Klein Declaration, pp. 11-13.) Petitioner offers no substantiation for his version of how a passing grade for the FYLSX should be calculated, and he has failed to show that the State Bar's procedures are erroneous. Petitioner and other FYLSX examinees have not been disadvantaged by this procedure. Rather, the procedure ensures the integrity of the exam and maintains the high competence level of successful applicants from exam to exam.

CONCLUSION

Petitioner has failed to present any facts to support his request for a writ of certiorari, nor has he demonstrated that any of the actions taken by Respondent in connection with his case were improper. For these and all of the foregoing reasons, Respondent the State Bar respectfully requests this Court to deny the petition for writ of certiorari.

DATED: February 9, 1996

Respectfully submitted,

DIANE C. YU
RICHARD J. ZANASSI
COLIN P. WONG

By: _____
Colin P. Wong
Attorneys for Respondent
The State Bar of California

APPENDIX A

Declaration of Stephen P. Klein

1. I hold a B.S. degree in Psychology from Tufts University and an M.S. and Ph.D. from Purdue University in Industrial Psychology with minors in Experimental Design and Tests and Measurement.

2. I have served as a consultant to the Committee of Bar Examiners of the State Bar of California (hereafter referred to as "the Committee") for over 20 years. I also have served as a consultant on testing matters to the National Conference of Bar Examiners, over 20 state boards of bar examiners, other professional licensing and certification agencies, the National Science Foundation, and the National Academy of Sciences.

3. I served as a Research Psychologist with the Educational Testing Service in Princeton, New Jersey and as an Associate Professor in Residence in the Graduate School of Education at the University of California, Los Angeles where I was chairman of the Research Methods

division. I taught courses at UCLA in the fields of research design, tests and measurement, and statistics.

4. I am currently a Senior Research Scientist with RAND in Santa Monica, California. I have been an expert witness in both state and federal courts and at administrative hearings on matters dealing with statistical analysis and testing.

5. I have read the PETITION FOR REVIEW prepared by KENNETH OWEN (the Petitioner). The remainder of this declaration discusses errors in the Petitioner's statements and conclusions. To facilitate an understanding of the defects in his arguments, I have divided this discussion into four parts. Part I summarizes the procedures that are used to compute scores and make pass/fail decisions on the First Year Law Students Examination (hereafter referred to as the "the FYLSX"). Part II discusses how and why "raw" scores on the multiple choice section are converted to "scale" scores. Part III

reviews how scores on the General Bar Exam (GBE) are scaled because the Petitioner has asked the court to apply these same procedures to the FYLSX. Part IV discusses why the Petitioner's proposed procedures violate the principles underlying scaling and do not correspond to the ones used on the GBE, and why applying the full GBE method to the FYLSX would lead to his receiving a lower rather than a higher FYLSX scale score.

Part I: The FYLSX

6. The FYLSX has two parts, a four-question essay test and a lOO-item multiple choice test. A candidate can earn up to 100 points on an essay question.

7. A candidate's multiple choice **"raw"** score is the number of questions answered correctly. Raw scores are converted to **"scale"** scores with an equation that takes the following form: Scale Score = (a)(Raw Score) + b. For example, the formula for the October 1994 exam was: Scale Score = (3.5)(Raw Score) + 37. Thus, a candidate with a raw score of 62 on this test (which is about average)

would earn a scale score of 254 (a different formula is used for converting raw scores over 85). The maximum possible multiple choice scale score is 400 points.

8. Because a candidate can earn up to 400 points per section, the maximum possible total score is 800 points. The Rules Regulating Admission to Practice Law in California state that "the passing grade shall be 70% of the highest possible grade" (Rule VIII, Section lb). In accordance with this rule, candidates must receive a total score of 560 or higher in order to pass (i.e., 70% of 800).

9. Candidates cannot pass overall by passing one section on one administration of the exam and the other section on a different administration. Indeed, there is no such thing as passing a section. Pass/fail decisions are based solely on total grades. Thus, the 70% rule only applies to the total score. It does not apply to each section of the exam.

Part II: Scaling

10. The formula that is used to adjust the raw scores on each form of the multiple choice test is derived using a standard statistical procedure that is often called "scaling" (the technically correct term is "equating"). This procedure compensates for possible variation in the average difficulty of the different forms (versions) of this test. For example, scaling adjusts for the fact that the form used on a one administration of the FYLSX may contain generally harder or easier items than those asked on a previous or subsequent exam. Thus, the Committee increases the fairness of the grading process by using scaling to adjust for these differences in test difficulty.

11. The procedures used to scale the multiple choice portion of the FYLSX correspond to those used to scale scores on other major tests, such as the Multistate Bar Examination (MBE) and the Law School Admission Test (LSAT). These procedures involve sprinkling into a given version of a test a set of questions that have been used in

the past and which have also been calibrated to a benchmark exam. In other words, each version of the test contains two types of items, those that are unique to that version and those that have been calibrated to the benchmark (the latter set are called "equators"). If the candidates taking a given form generally score higher on the repeated items than did the candidates who answered those same questions on the benchmark exam, then the scores on the new form are adjusted upwards so that the group taking it receives a higher mean adjusted score than the group who took the benchmark test. Conversely, if those taking the new version do less well on the repeated items than those who took those same items in the past, then the new group will have a lower mean adjusted score than the previous group.

12. The logic underlying scaling is simple. Specifically, if two groups do equally well when asked the same questions (i.e., the repeated items), then these groups are performing at the same level of proficiency and

therefore should have the same mean scale score. Any difference in their total "raw" scores (number of questions answered correctly) across all the items in their respective versions of the test (i.e., repeated + unique items) must be due to differences in the average difficulty of their respective sets of unique items. Similarly, if one group has a higher average score on the repeated items than the other group, then equating makes sure this difference is reflected in their respective scale scores. In short, *scaling increases the fairness of the testing process by adjusting for any differences in mean raw scores between groups that stems from one group taking a generally harder version of the test than some other group.*

Part III: The General Bar Examination (GBE)

13. The General Bar Examination (hereafter called the GBE to be consistent with the Petitioner's terminology) consists of the MBE (a 200-item multiple choice test) and a written section composed of six essay questions and two performance test problems.

14. MBE raw scores (i.e., number of items answered correctly) are converted to scale scores using a formula that takes the following form: Scale = a(raw score) + b. The procedures for computing the values of "a" and "b" in this formula correspond with those used to derive the scaling formula for the multiple choice portion of the FYLSX. The rationale also is the same; i.e., adjusting for possible differences in test difficulty across administrations. However, MBE raw scores are converted to a 2,000 point scale whereas FYLSX multiple choice scores are converted to a 400 point scale. Because no two versions of the MBE are identical, there is a separate scaling equation (i.e., values of "a" and "b") for each administration of this exam.

15. Total raw written scores are converted to the same scale of measurement as that used on the MBE. The formula for doing this is: Scaled Written = [(A - B)/C][D] + E where A is the candidate's raw written score, B is the mean of the written scores across all the candidates who

took the exam, C is the standard deviation of these scores, and D and E correspond to the standard deviation and mean of these candidates' scaled MBE scores. The values of B, C, D, and E in this formula change with each administration of the exam.

16. An applicant's total GBE score equals .35 times the MBE scale score plus .65 times the Written scale score. Applicants need a total scale score of 1440 or higher to pass.

Part IV: The Petitioner's Request

17. The Petitioner says that "Scaling formulas applied to the multiple-choice portion of the FYLSX will result in scores that are on average scaled DOWNWARD by more than 3%. Scaling formulas applied to the multiple choice portion of the GBE will result in scores that are scaled UPWARD by more than 9%. Scaling formulas applied to the written portion of the GBE result in scores that are on average scaled UPWARD by more than 9%" (Page 4, Section B with original emphasis).

18. It appears the Petitioner computed his measure of the "upward" or "downward" effect of scaling on a section by comparing the percentages from Formulas #1 and #2 below for a given raw score on that section.

$$\text{(\#1) Raw Score \%} = \frac{\text{Candidate's Raw Score}}{\text{Total Possible Raw Score}} \times 100$$

$$\text{(\#2) Scale Score \%} = \frac{\text{Candidate's Corresponding Scale Score}}{\text{Total Possible Scale Score}} \times 100$$

19. The Petitioner apparently believes an UPWARD effect occurs when the value from Formula #2 is greater than it is from Formula #1 and a DOWNWARD effect occurs when the opposite is true. According to this logic, a NEUTRAL effect occurs when Formulas #1 and #2 yield the same value for a given raw score. Nevertheless, the Petitioner wants the Committee to compute FYLSX

multiple choice scale scores so that the Formula #2 value for a given raw score is larger than the Formula # I value.

20. The sum total of the Petitioner's rationale for his request is that on the GBE, the Formula #2 value is generally larger than the Formula #1 value. His observation about the relative sizes of the Formula #1 and #2 values on the GBE is correct, but meaningless. It is meaningless because these formulas are not used on the GBE and they ignore the whole reason for scaling, namely, adjusting raw scores across tests for possible differences in the difficulty of their questions. The Petitioner's proposed procedure does not control for such differences in test difficulty. The only effect of his proposed method for computing scores is that it would make it easier to pass a current version of the FYLSX than a version that was given in the past. In other words, his proposal would negate and frustrate the whole purpose of scaling.

21. The Petitioner's proposal is based on the assumption that the difference in percentages between

Formulas #1 and #2 on the GBE is constant. That assumption is false. This percentage not only changes from exam-to-exam, but also within an exam (i.e., the size of the difference between the two percentages varies as a function of the magnitude of the raw score being converted). Thus, his proposal cannot be implemented.

22. The Petitioner has asked the court "to apply GBE scaling formulas to Petitioner's June 1994 FYLSX' scores (pages 4-5). The Petitioner believes this will result in his earning a higher score. The Petitioner's request does not make sense. As per the discussion in Part III, the values of "a" and "b" in the formula the Committee uses to convert MBE raw scores to scale scores changes with each exam. There is no one formula that is applied to all exams.

23. Moreover, even if there was a single formula, the Petitioner's request is illogical because the equation for a given MBE converts scores to a very different scale of measurement than the one used on FYLSX. For example, a score of 560 on FYLSX (70% of the maximum) in no way

corresponds to the same level of proficiency as a score of 1400 (let alone 1440) on the GBE.

24. One could, of course, scale the FYLSX essay scores that are earned on a given administration to these same candidates' scaled FYLSX multiple choice scores. This procedure would use the formula in paragraph 15 above and therefore correspond directly with the method that is used to scale written raw scores on the GBE. However, this plan would have the exact opposite effect than the one the Petitioner desires. Specifically, it would lower FYLSX total scores for all candidates (including the Petitioner) and thereby lower their passing rate. This would occur because on average, the mean total raw FYLSX essay score on a given administration is greater than the mean FYLSX multiple choice scale score on that administration.

25. In sum, the Petitioner's request is without merit because it would violate the very principles underlying scaling, it cannot be implemented because it is based on erroneous assumptions about the scaling equations, and his

proposal to use the GBE's methods on the FYLSX would lead to Ms receiving a lower rather than a higher score.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Santa Monica, California on May 30, 1995.

"s/Stephen P. Klein"

Stephen P. Klein, Ph.D.